84-78

No. .....

In The

Supreme Court of the United States

October Term, 1983

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ROBERT L. CAMPBELL, et al,

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION;
FEDERAL AVIATION ADMINISTRATION,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE FEDERAL CIRCUIT COURT OF APPEALS

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

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QUESTIONS PRESENTED FOR REVIEW

A. DID THE CHANGING OF THE BURDEN OF PROOF AND THE CREATION OF A NEW PRESUMPTION, AFTER THE PETITIONERS' HEARING VIOLATE THE ADMINISTRATIVE PROCEDURE ACT OR THE PETITIONERS' RIGHT TO THE DUE PROCESS OF LAW?

B. DID THE FEDERAL CIRCUIT COURT OF APPEALS COMMIT ERROR IN HOLDING THAT MERE ABSENCE DURING A STRIKE OF GENERAL KNOWLEDGE CAN SUSTAIN A FINDING OF STRIKE PARTICIPATION?

C. DID THE FAILURE OF THE AGENCY TO GIVE A FULL SEVEN DAYS TO RESPOND TO THE NOTICE OF PROPOSED REMOVAL REQUIRE REVERSAL OF THE TERMINATION OF THE PETITIONERS?

D. DID THE PROMULGATION OF ADVISORY OPINIONS VIOLATE 5 U.S.C. 1205(g) AND THE PETITIONERS' RIGHT TO THE DUE PROCESS OF LAW?

E. IS REMOVAL THE MANDATORY MINIMUM PENALTY FOR STRIKING AGAINST THE UNITED STATES?

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JURISDICTION

The United States Court of Appeals for the Federal Circuit rendered its decision in the instant case on May 18, 1984. On June 7, 1984, the Petitioners' motion for a

stay of mandate was granted by the United States Court of Appeals for the Federal Circuit, said stay to expire on July 9, 1984 if a petition for a writ of certiorari is not filed with this Court. Jurisdiction is sought pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the following statutes and regulations:

A. "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ." Fifth Amendment, United States Constitution.

B. § 1918.

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike

against the Government of the United States or the government of the District of Columbia;

shall be fined not more than $1,000 or imprisoned not more than one year and a day or both. 18 U.S.C. § 1918.

C. § 7311.

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia. 5 U.S.C. § 7311.

D. § 7513.

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchaper, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request. 5 U.S.C. § 7513.

E. § 1205.

(a) The Merit System Protection Board shall—

* * *

(g) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register. 5 U.S.C. § 1205.

F. § 551.

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix. 5 U.S.C. § 551.

G. § 553.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give in interested person the right to petition for the issuance, amendment, or repeal of a rule. 5 U.S.C. § 553.

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STATEMENT OF THE CASE

The Petitioners were employed by the Federal Aviation Administration (hereinafter referred to as "agency") as air traffic control specialists. In August of 1981, a nationwide strike of air traffic controllers was called by

the Professional Air Traffic Controllers Organization (PATCO).

At approximately 11:00 a.m. on August 3, 1981, President Reagan went on national television and radio and stated that all controllers who did not return to work within forty-eight hours had forfeited their jobs and would be terminated.

Each petitioner who did not return to work at a designated time received a notice of proposed removal for allegedly participating in a strike and for unauthorized absence (AWOL). Each notice of proposed removal invoked the so-called crime provision reducing the response period to "within seven days." Each petitioner requested an extension of this seven-day period and the scheduling of oral responses. This request for extension was denied in each of the Petitioners' cases and an oral response was never scheduled.

Subsequent thereto, each Petitioner filed a written response to the proposed removal and each was mailed a notice of termination. Each Petitioner timely filed a notice of appeal to the Merit Systems Protection Board (hereinafter referred to as "MSPB") and a hearing was held before a hearing officer (hereinafter referred to as "presiding official"), on May 19, 21, 24, and 25 of 1982. On October 7, 1982, a decision was rendered by Presiding Official Gail E. Skaggs in which the removal of each petitioner was affirmed.

A Petition for Review was filed with the MSPB and on April 25, 1983, a decision was issued by the Board affirming the terminations. The Petitioners then timely filed a

Petition for Review in the United States Court of Appeals for the Federal Circuit.

On February 24, 1983, the Federal Circuit Court of Appeals issued an Order establishing seven "lead cases" which would be used as vehicles to decide all of the common issues of law affecting the cases of approximately twelve thousand (12,000) air traffic controllers. The case of *Robert L. Campbell, et al. v. Department of Transportation, et al.* was designated as one of these lead cases. Every other appeal pending in the Federal Circuit Court of Appeals involving air traffic controllers was to be held in abeyance pending a decision by the Federal Circuit Court of Appeals. On May 18, 1984, the Federal Circuit Court of Appeals indicated that it would continue to hold all other air traffic controller cases in abeyance pending final resolution of these issues by this Court.

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ARGUMENT

A. Introduction

The "air traffic controller" cases represent the first time that any federal court was faced with a large-scale strike by federal employees. The decisions emanating from the Federal Circuit Court of Appeals in the consolidated "lead cases", in a number of critical ways, create new bodies of law or meaningfully contradict or overrule decisions by this Court or other circuit courts of appeals. The body of law created by the Federal Circuit Court of Appeals will substantially impact the rights, duties, and obligations of federal employees for years to come. The

areas of first impression, the conflicts with prior decisions by this Court and other circuit courts of appeals, and the sheer magnitude and importance of the instant case renders it worthy of certiorari to the United States Supreme Court.

The Petitioners in the "lead cases", including the members of *Campbell, et al.*, raised a number of important common issues. These included: the agency committed error in denying controllers a full seven days to respond to the notice of proposed removal; the MSPB created a new burden of proof, one which shifted the burden of persuasion to the controllers; the controllers were not on strike or AWOL after the presidential deadline of 11:00 a.m. on August 5, 1981 due to confusion over the appropriate deadline for reporting to work; removal is not the mandatory minimum penalty for striking against the United States; the controllers' terminations were tainted by command influence in that high government officials, as opposed to those officials designated by law to do so, made the decision to terminate the controllers; the Petitioners received disparate treatment as compared to those controllers who returned to work prior to their individual deadlines; and the controllers were illegally suspended pending a final decision in their individual cases. A number of these issues will be specifically addressed in the context of this Petition for Writ of Certiorari and the Petitioners, in the instant case, seek review of all these issues.

Along with the common issues discussed above, the Petitioners in *Campbell, et al.* raised, and in fact stressed, three additional arguments:

(a) The changing of the burden of proof and the creation of a new presumption *after* the Petitioners' hearing violated the Petitioners' right to due process of law.

(b) The changing of the burden of proof and the creation of a new presumption, after the Petitioners' hearing and without advance notice or opportunity for comment, violated the Administrative Procedure Act.

(c) The promulgation of advisory opinions by the MSPB violated 5 U.S.C. §1205(g), as well as the Petitioners' right to have a meaningful review of the issues raised in the administrative process.

Despite the fact that counsel for the Petitioners in *Campbell, et al.* was specifically directed by the court to address these three issues in his oral argument, the Federal Circuit Court of Appeals never directly addressed the first two issues enumerated above. In fact, the Administrative Procedure Act is not mentioned in any of the decisions in the "lead cases".

With respect to the advisory opinions issue, the Federal Circuit Court of Appeals side-stepped the issue by making a distinction between the issuance of advisory opinions to the public, and the circulation of advisory opinions to presiding officials within the MSPB. Furthermore, the Federal Circuit Court of Appeals indicated in its decision that there is no evidence that the presiding officials abdicated their responsibility or their independent discretion. The Court ignored the fact that the Petitioners had moved, during the processing of their appeal for a partial remand for the purpose of conducting an evidentiary hearing into the breadth and effect of the advisory opinions, (see Appendix, pp. 66-76).

In addition to the creation of new law and the conflicts with other courts of appeals, the Federal Circuit Court of Appeals' failure to fully address and adjudicate im-

portant issues raised by the Petitioners militates towards review by the United States Supreme Court.

B. The Changing Of The Burden Of Proof And The Creation Of A New Presumption, After The Petitioners' Hearing, Violated The Administrative Procedure Act And The Petitioners' Right To Due Process Of Law.

5 C.F.R. §1201.56 (1979), which is the regulatory codification of 5 U.S.C. §7701, deals with the burden of proof to be applied in hearings before the Merit Systems Protection Board. These sections clearly place the burden of proof on the agency which has taken the adverse action to support same by a preponderance of the evidence. The burden of proof is only placed on a particular appellant with respect to affirmative defenses, (5 C.F.R. §1201.56(b) 1979) and issues of jurisdiction and timeliness of filing, (5 C.F.R. §1201.56(2)).

In the course of adjudicating air traffic controller cases, the MSPB created new rules and standards regarding the burden of proof it would employ in adjudicating specific cases. This new rule or standard, which was first set forth in the case of *Shapansky v. Department of Transportation,* Docket No. DA075281F1130 (October 28, 1982), and was applied to and used as a basis for the decision in the petitioners' case. This occurred despite the fact that the decision by the MSPB in *Shapansky* occurred five months *after* the petitioners' hearing before the presiding official. Therefore, the petitioners had no advance notice or warning that a new burden of proof would be applied in adjudicating their case before the MSPB. The net effect is that the petitioners never had an opportunity to conform their defense to this new burden of proof. This action taken

by the Board not only violates the Administrative Procedure Act, it violates the petitioners' right to the due process of law.

The *Shapansky* case was one of the first controller cases to be decided by the Merit Systems Protection Board. In footnote 2 of that decision, the Board states the following:

> In cases, such as this one, in which the existence of a strike is a matter of general knowledge, the agency may establish a *prima facie* case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike. The burden of persuasion would then shift to the employee to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his absence was due to some factor other than intentional participation in the strike. The agency, of course, must ultimately establish appellant's participation by a preponderance of the evidence pursuant to 5 U.S.C. §7701(c)(1)(B).

Id., at 6.

The decision in *Shapansky* was a radical departure from previous case law regarding what must be shown to prove strike participation. See *United Federation of Postal Clerks v. Blount,* 325 F.Supp. 879 (D. D.C. 1971), *aff'd.* 404 U.S. 802 (1971). In fact, despite its best efforts to do so, the MSPB was unable to harmonize the creation of this new burden of proof or new presumption with two cases it had previously decided: *Jones v. Tennessee Valley Authority,* 82 FMSR 7008 (February 19, 1982); *Duckett and Yardley v. Tennessee Valley Authority,* 82 FMSR 7013 (February 29, 1982).

In *Jones and Duckett and Yardley,* which arose out of the same job action, the MSPB held that, based upon the specific facts presented, the agency made a *prima facie* case by showing absence from duty *and* presence among picketers. In the first instance, the MSPB never asserted in these two cases that this standard would be applied to all situations involving strikers. More importantly, it does not create a standard or presumption that mere unauthorized absence from duty during a strike creates a *prima facie* case of voluntary participation therein with the burden of persuasion then shifting to the employee. Therefore, the holding by the Board in *Shapansky,* can only be described as the creation of a new standard or rule regarding burdens of proof and persuasion. In creating this new rule or standard, the Board violated the Administrative Procedure Act in various pertinent parts. Additionally, by creating a new rule and standard to govern the instant case *after* the hearing had taken place, the petitioners' right to due process of law were violated.

Section 551(4) of the Administrative Procedure Act, 5 U.S.C. §551(4) (1982) defines a rule as "an agency statement of general or particular applicability and future effect designed to implement . . . law or policy . . . ". Under 5 U.S.C. §553(b), (c), (d) (1982), an agency must give 30 days notice of a proposed substantive rule and must give interested parties an opportunity to submit written responses. Furthermore,

> "It is fundamental that administrative regulations are void unless they are promulgated in strict compliance with the Administrative Procedure Act, 5 U.S.C. §553."

Rivera v. Patino, 524 F.Supp. 136, 147 (N.D. Cal. 1981). 5 U.S.C. §551 (1982) defines what administrative bodies come within the definition of an "agency" and clearly the MSPB is included within that definition. Finally, although the MSPB may be exempted from the dictates of Section 554 of the A.P.A., 5 U.S.C. §554 (1982), it does come within and is governed by 5 U.S.C. §553 (1982).

An administrative agency may announce new principles either in an adjudicative proceeding or through formal rule-making pursuant to 5 U.S.C. §553 (1982), *NLRB v. Bell Aerospace Company,* 416 U.S. 267, 294 (1974). This Court, however, has indicated a general policy that rule making is preferred to adjudication as a method of announcing new principles and that rule making provisions "may not be avoided by the process of making rules in the course of adjudicatory proceedings". *NLRB v. Wyman-Gordon Company,* 394 U.S. 759, 764 (1969).

Although an administrative agency has the discretion to choose between rule-making and adjudication in the announcing of new principles of law, there are a number of circumstances or situations where courts have required rule-making rather than adjudication. Courts have repeatedly frowned on situations where an agency is changing standards of law and then applying them retroactively in an adjudicatory proceeding. *Ford Motor Company v. FTC,* 673 F.2d 1008 (9th Cir. 1981) *cert. den.,* — U.S. —, 103 S.Ct. 3474 (1981); *United Gas Pipeline Company v. Federal Energy Regulatory Commission,* 597 F.2d 581 (5th Cir. 1979), *cert. den.,* 445 U.S. 916 (1980); *Port Terminal Rail Association v. United States,* 551 F.2d 1336 (5th Cir. 1977); *Precious Metal Associates v. Commodity*

Futures Trading Commission, 620 F.2d 900 (1st Cir. 1980); *Frankl'n v. Shields,* 569 F.2d 784 (4th Cir. 1971), *cert. den.,* 435 U.S. 1003 (1978).

In *Hatch v. Federa' Energy Regulatory Commission,* 654 F.2d 825 (D.C. Cir. 1981), the D.C. Circuit recognized that "the Administrative Procedure Act required that a person involved in an agency adjudicatory hearing 'shall be timely informed of . . . [the] law asserted'." *Id.,* at 835. The Court went on to state the proposition that an agency may not change a standard of law and then apply it retroactively without first giving notice to the parties and affording them an opportunity to introduce evidence which is based upon this new standard. *Id.,* at 835. To act in a contrary manner would violate the Administrative Procedure Act, as well as abridging an individual's right to due process of law.

> " . . . when, as here, the change is a qualitative one in the nature of the burden of proof so that additional facts of a different kind may now be relevant for the first time, litigants must have a meaningful opportunity to submit conforming proof."

Id., at 835.

In *Hill v. Federal Power Commission,* 335 F.2d 355 (5th Cir. 1964) the Fifth Circuit Court of Appeals stated that an agency has a duty "at some stage prior to the close of proof to declare what it considers the relevant standards to be." *Id.,* at 358. To act otherwise, "deprives producers (petitioners) of a fair and adequate hearing because the standards to be applied were neither evolved nor announced until the decision holding them unsatisfied." *Id.,* at 362 (parenthesis added).

In *Aero Mayflower Transit Company v. ICC*, 699 F.2d 938 (7th Cir. 1983), the Seventh Circuit took a similar view by stating:

> "Courts have commonly held that when an agency wants to change a controlling standard and apply it in an adjudicatory setting, parties before the agency must be given notice and opportunity to introduce evidence bearing on the new standard."

Id., at 942.

Although this issue was presented to the Federal Circuit Court of Appeals in the *Campbell* case, both in briefs and oral argument, the only response by the Federal Circuit Court appears at Pages 13-14 of the *Shapansky* decision (Appendix, pp. 27-28). That discussion focuses only on whether earlier case law required active involvement in a strike in order to establish strike participation. (See Argument Section C in which the Petitioners argue that the decision of the Federal Circuit does change existing law.) This discussion ignores the fact that a new evidentiary presumption was created after the completion of the Petitioners' hearing.

Review by this Court is necessary in the instant case to address this issue and give clear direction to courts of appeals regarding whether an agency can create and apply new standards of law after the completion of an individual's adjudicatory hearing.

C. The Holding Of The Federal Circuit Court Of Appeals That Mere Absence During A Strike Of General Knowledge Will Sustain A Finding Of Strike Participation Creates A New Standard Of Law In Conflict With Previous Authority.

In its decision in the *Schapansky* case, the Federal Circuit Court of Appeals adopted the holding of the MSPB that mere absence during a strike of general knowledge will sustain a finding of strike participation. (See discussion in Argument Section B.) This decision is in direct conflict with a body of law that has evolved over a number of years.

In *United Federation of Postal Clerks v. Blount,* 325 F.Supp. 879 (D.D.C. 1971), *aff'd.* 44 US 802, the District Court for the District of Columbia held that only an actual refusal by an employee, in concert with others, to provide services to one's employer is forbidden by 5 U.S.C. §7311(3) and penalized by 18 U.S.C. §1918 (1982). Prior to the Federal Circuit Court of Appeals' decision in the instant case, in order for the agency to sustain its burden of proving that an employee was striking, specific evidence was required that the employee intentionally withheld his services in concert with others. *Tennessee Valley Authority v. Bailey,* 495 F.Supp. 711 (ED Tenn. 1980).

In *United States v. McCubbin,* 81-2059, *et. seq.* (10th Cir. 1983), the Tenth Circuit Court of Appeals, after reviewing evidence nearly identical to that adduced in the instant case, held that the government "must show *concerted,* not just parallel action . . . ." *Id.,* at —.

The decision by the Federal Circuit Court of Appeals upholding the presumption created in the *Schapansky* case eliminates the essential elements of roof required by *Blount, Bailey* and *McCubbin* and impermissibly shifts

the burden of production of evidence to the employee. *Cf. Bonet v. United States Postal Service,* 661 F.2d 1071, 1078 (5th Cir. 1981). See also, *United States v. PATCO,* 524 F.Supp. 160 (D. D.C. 1981); *Young v. Hampton,* 568 F.2d 1253 (7th Cir. 1977).

This conflict between the Federal Circuit Court of Appeals' endorsement of the concept that mere absence during a strike of general knowledge is proof of strike participation and prior cases which require an actual refusal by a particular employee in concert with others creates a great deal of confusion and leaves this area of law unsettled and, therefore, makes this case appropriate for review by this Court.

D. Failure Of The Agency, In Invoking The Crime Provision, To Give The Petitioners A Full Seven Days To Respond To The Notice Of Proposed Removal Renders The Decision "Not In Accordance With The Law" In Violation Of 5 U.S.C. § 7701(c) (2) (C) (1982).

In notices of proposed removal issued to the Petitioners, each individual was informed that he must respond "within seven calendar days after you receive this letter." The term "within seven days" must be interpreted to mean less than seven days, which constitutes a violation of 5 U.S.C. §7513(b)(2) (1982). The Petitioners argued before the Federal Circuit Court of Appeals that that failure to give a full seven days renders the decision by the agency "not in accordance with the law" in violation of 5 U.S.C. §7701(c)(2)(C) (1982). See *Stringer v. United States,* 90 F.Supp. 375 (Ct. Cl. 1950). The Respondents argued that any defect in affording the full notice period must be evaluated using a "harmful error" analysis, pursuant to 5 U.S.C. §7701(c)(2)(A) (1982).

See *Shaw v. United States Postal Service*, 697 F.2d 1078 (F. Cir. 1983). The legislative history regarding the relative applicability of the "harmful error" subsection of 5 U.S.C. §7701(c)(2), 5 U.S.C. §7701(c)(2)(A) and the "not in accordance with law" subsection, 5 U.S.C. §7701(c)(2)(C) is admittedly unclear.

In arguments before the Federal Circuit, the respondents relied on the Senate Report S. 2640, §205, 95th Cong. 2d Sess., reprinted in 2 House Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of Civil Service Reform Act of 1978, 1331 (Comm. Print. No. 96-2, 1979) (hereinafter referred to as "*Leg Hist*", while the petitioners cited passages from the House Report, H.R. Rep. No. 95-1403 95th Cong. 2d Sess. 7 (1978), *reprinted* in 1 *Leg Hist* 636, 644.

In Footnote 3 of its decision in the *Adams* case (Appendix, pp. 40-41), the Federal Circuit Court of Appeals adopts the "harmful error" approach, without even referring to or discussing the *Stringer* decision. In addition to resolving the cases of these petitioners, guidance is needed from this Court regarding the applicable standard to be applied in determining whether an error on the part of a federal agency requires reversal of an agency decision.

E. The Promulgation Of Advisory Opinions By The General Counsel's Office Of The MSPB Violated 5 U.S.C. § 1205(g) (1982).

After a decision was rendered in the instant case by the MSPB, the Petitioners discovered through the Freedom of Information Act that advisory opinions had been issued by the General Counsel's office and had been circulated to presiding officials. After making this discov-

ery, the Petitioners filed a Motion for Partial Remand for the purpose of conducting a hearing in order to determine the effect of the advisory opinions on the decisions issued by presiding officials. (See Appendix, pp. 66-70.) This motion was denied by the Federal Circuit Court of Appeals.

The Petitioners argued that the creation, circulation and incorporation of advisory opinions in the instant case violated 5 U.S.C. § 1205(g) (1982), as well as the Petitioners' due process right to have a meaningful review of the issues raised in the administrative process. The Petitioners cited passages of the decision in their case which were lifted verbatim from the advisory opinions. (See Memorandum in Support of Motion for Partial Remand, Appendix, pp. 70-77.)

In its decision in the *Campbell* case, the Federal Circuit Court of Appeals stated, "The thrust of 5 U.S.C. § 1205(g) appears to be to prohibit the boards from *issuing* advisory opinions to the public, a prohibition comparable to the prohibition against federal courts issuing advisory opinions, and in contrast to other agencies which are authorized to issue advisory opinions as a guide to future conduct." (Appendix, p. 9.) A decision of the Federal Circuit on this point is a matter of first impression which, if allowed to stand, would seriously undermine the purposes behind the promulgation of 5 U.S.C. § 1205(g) (1982).

The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. (1978) established the MSPB to take over the functions of the Civil Service Commission. This change was motivated in large part as a reaction to the perceived defects in the latter agency (see Memorandum in Support

of Motion for Partial Remand, Appendix, pp. 70-77). Section 1205(g) of the Civil Service Reform Act of 1978, 5 U.S.C. 1205(g) (1982) was promulgated to protect the integrity of this new adjudicatory process. The interpretation given to this statutory enactment by the Federal Circuit would significantly undercut its effectiveness, and therefore review by this Court of the Federal Circuit's limiting interpretation is necessary.

F. Removal Is Not The Mandatory Minimum Penalty For Striking Against The United States.

In rendering its decisions in the lead cases, the MSPB held that removal is the mandatory minimum penalty for striking against the United States. The Petitioners raised this issue before the Federal Circuit, which chose not to address the issue head-on. (See *Schapansky* decision, pp. 18-19; Appendix, pp. 31-32.)

The statute in question, 5 U.S.C. § 7311 (1982), reads in pertinent part:

> An individual may not accept or hold a position in the government of the United States or the government of the District of Columbia if he . . . (3) participates in a strike, or asserts the right to strike, against the government of the United States or the government of the District of Columbia. . . .

Clearly, 5 U.S.C. § 7311 (1982) is a penal statute which must be strictly construed against the United States government. 3 *Sutherland Statutory Construction*, § 59.03.

If one is to look at the plain meaning of the statute, it indicates that removal is not mandatory. Section 7311 conspicuously uses the word "may" rather than the more mandatory term "shall". The use of the term "may" dis-

tinguishes § 7311 from other statutory enactments which are mandatory in their approach.

The previous enactment of § 7311 read as follows:

> [n]o person shall accept or hold office or employment in the government of the United States who participates in a strike.

Pub. L. No. 84-330, § 18 p-r, 69 Stat. 624 (1955), *reprinted in* 1955 U.S. Code Cong. & Ad. News 704.

The current phraseology emanates from Pub. L. 89-554, 80 Stat. 378, which was enacted in 1966. Presumably, Congress had an expressed purpose in making this change. It stands to reason that this change from the mandatory language to the discretionary language was intended to give the government more flexibility in dealing with employees who have engaged in strike or strike-related activities. Perhaps, this was the codification or acceptance of the reality that many federal employees have engaged in strike or strike-related activities and not been terminated. In fact, statistics show that between the years of 1962 and 1979, there were 22 work stoppages involving a total of more than 200,000 employees. "Work Stoppages in Government, 1979", *Government Employee Rel. Rep.* (BNA) reference file 71:1011, 1014. This study by the Bureau of Labor Statistics indicates that the government has explicitly, or at least implicitly, recognized and accepted the fact that a penalty less than removal may be applied in cases where federal employees engage in work stoppages or strikes.

This recognition on the part of the government is also reflected in the fact that injunctions obtained by federal agencies in the face of strike activity have regularly in-

cluded "back to work" clauses. For example, see *United States v. Robinson,* 449 F.2d 925, 928, n.6 (9th Cir. 1971); *United States v. Moore,* 427 F.2d 1020, 1022 (10th Cir. 1970); *United States v. PATCO,* 107 LRRM 3210, 3213 (D. D.C. 1981). If § 7311 was to be interpreted in the manner asserted by the Board, then these back to work clauses would be illegal. Furthermore, if the government seriously believed that § 7311 was an absoluate bar to federal employment, it would not have taken the position that air traffic controllers, who had been removed for striking, could apply for employment in federal agencies other than the FAA. See *Federal Personnel Bulletin* No. 731-6. The longstanding interpretation of agencies within the executive branch, that striking employees need not be terminated, is entitled to legal recognition. See *Miller v. Youakim,* 440 U.S. 125, (1975).

In *United States v. PATCO,* 438 F.2d 79 (2nd Cir. 1970), *cert. den.,* 402 U.S. 915 (1971), a case which was litigated in the context of the 1970 sick-out/strike of air traffic controllers, the Second Circuit Court of Appeals stated the following:

> Although [7311] appears to speak in absolute terms . . . there is a substantial question whether this statute must be read in a manner which would require the government to dismiss all controllers and thereby end air travel until replacements could be trained.

Id. at 82 n.3.

In the case of *Miller v. Bond,* 641 F.2d 997 (D.C. Cir. 1981), the D.C. Circuit Court of Appeals implicitly agreed that participation in a strike could be punished less than removal. In that case, the Court stated:

> Though participation in a strike can be grounds for termination of a federal employee, by March 31, 1970,

> the FAA had decided that suspension would be a more appropriate punishment for those who took part in the 1970 sick-out.

Id. at 1000. See also *United States v. PATCO,* 653 F.2d 1134 (7th Cir. 1981), *cert. den.,* 102 S.Ct. 639 (1980).

Finally, in a recent Congressional Research Service Memorandum, Congressional Research Service, Library of Congress, "*The Federal Employee Strike Ban and the Patco Strike,*" 41-45 (February 22, 1982), the following conclusion is stated:

> It does not appear that the underlying purpose of the anti-strike laws, to prevent the interruption of a central government service, would be furthered by construing this statute in such an inflexible manner.

Id. at 44-45.

The MSPB has the final administrative word on the rights, duties and obligations of federal employees. By implicitly affirming the decision of the MSPB on this issue, the Federal Circuit has established removal as the mandatory minimum penalty for strike activities against the United States which stands in conflict with the authority cited above and which therefore necessitates review by this Court.

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CONCLUSION

Based upon the statements and facts discussed herein, the Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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